UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CARLOS MUNOZ, individually and on behalf of all others similarly situated,

Plaintiff,

- against -

CHINA EXPERT TECHNOLOGY, INC,; PKF NEW YORK, CERTIFIED PUBLIC ACCOUNTANTS, A PROFESSIONAL CORPORATION, PKF HONG KONG, CERTIFIED PUBLIC ACCOUNTANTS; BDO MCCABE LO LIMITED CERTIFIED PUBLIC ACCOUNTANTS, BDO SEIDMAN, LLP,

Defendants.

07 – CV – 10531 (AKH)

MEMORANDUM OF LAW IN SUPPORT OF PKF NEW YORK'S MOTION FOR RECONSIDERATION OR IN THE ALTERNATIVE CERTIFICATION OF THE ORDER DATED JULY 19, 2011 FOR INTERLOCUTORY APPEAL PURSUANT TO 28 U.S.C. §1292(b)

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sued here as PKF New York, Certified Public Accountants, A Professional Corporation

Rehearing granted on basis of Janus Capital, U.S. Sup. Ct. June 13, 2011. Def PKF's brief shall be filed by 8/26/11; opp brief by 9/16/11; reply brief by 9/23/11.
8-5-11
[signature]

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This memorandum of law is respectfully submitted on behalf of defendant PKF, Certified Public Accountants, A Professional Corporation, mistakenly identified in the Fourth Amended Complaint as PKF New York, Certified Public Accountants (hereafter "PKF New York")[1], in support of its motion for reconsideration or, in the alternative, for Certification of an interlocutory appeal under 28 U.S.C. §1292(b), of the July 19, 2011 Order of this Court, which denied PKF New York's motion for dismissal of plaintiffs' claims pursuant to Federal Rules of Civil Procedure 12(b)(6) and 9(b), and pursuant to the Private Securities Litigation Reform Act ("PSLRA"), and for such other and further relief as this Court deems just and proper.

PRELIMINARY STATEMENT

If there had been any doubt about whether the case as against PKF New York should be dismissed, the Supreme Court's recent decision in *Janus Capital Group, Inc. et al. v. First Derivative Traders*, 2011 U.S. LEXIS 4380 (decided on June 13, 2011), has removed all uncertainty. It is now indisputably clear that only the actual "maker" of an allegedly fraudulent statement may be subject to a private securities fraud claim. Unfortunately, the decision came out after PKF New York submitted its motion papers directly on this point. Now, with the opportunity to fully consider the *Janus* decision, this Court should reconsider its prior ruling refusing to dismiss the case as against PKF New York or in the alternative, certify the issue for immediate interlocutory appeal.

[1] At the time the Amended Complaint was filed naming PKF New York, Certified Public Accountants, a Professional Corporation, a defendant, the entity was known as PKF, Certified Public Accountants, A Professional Corporation. Now the entity is named PKF O'Connor Davies, LLP.

POINT I

THIS COURT'S ORDER OF JULY 19, 2011, MUST BE RECONSIDERED IN LIGHT OF THE SUPREME COURT'S RULING IN *JANUS*

The Applicable Law

Motions for reconsideration in the Southern District of New York are governed by Local Civil Rule 6.3, which states, in part, that the motion shall "set[] forth concisely the matters or controlling decisions which counsel believes the court has overlooked." "Reconsideration of a previous order by the court is an extraordinary remedy to be employed sparingly in the interest of finality and conservation of scarce judicial resources." *Anderson News, L.L.C. v. American Media, Inc.*, 732 F. Supp. 2d 389, 406 (S.D.N.Y. 2010) (quoting *Hinds County, Miss. V. Wachovia Bank N.A.*, 700 F. Supp. 2d 378, 407 (S.D.N.Y. 2010)).

To prevail, a party "must demonstrate that the Court overlooked controlling decisions or factual matters that were put before it on the underlying motion." *Eisemann v. Greene*, 204 F.3d 393, 395 n.2 (2d Cir. 2000) (quoting *Shamis v. Ambassador Factors Corp.*, 187 F.R.D. 148, 151 (S.D.N.Y. 1999)) *accord* Local Civil Rule 6.3 (authorizing motion for reconsideration when there are "matters or controlling decisions which...the Court has overlooked.") "The major grounds justifying reconsideration are an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Virgin Atlantic Airways, Ltd. v. National Mediation Board*, 956 F.2d 1245, 1255 (2d Cir. 1992) (internal quotation marks omitted).

Janus Constitutes an Intervening Change of Controlling Law

In its motion to dismiss the Fourth Amended Complaint, PKF New York presented the argument that plaintiffs are improperly seeking to hold PKF New York

liable for a statement made by another distinct legal entity, PKF Hong Kong.[2] That PKF Hong Kong made the statement is not in dispute; indeed, PKF Hong Kong has submitted a Declaration to this Court confirming such. (D.E. 112). Moreover, Plaintiffs' have failed to allege that any misrepresentation was made specifically by PKF New York, and, in fact, Plaintiffs already posses information confirming this fact based on documents produced to them by PKF New York in response to a subpoena before PKF New York was ever added as a defendant in this case. (Kelly Declaration ¶4). Notwithstanding plaintiffs' argument that there was public attribution due to the confusing nature by which PKF Hong Kong signed the audit report and CXTI's unclear description of its accountants, the Supreme Court has now made it abundantly clear that only the actual "maker" of the allegedly false statement can be held liable under Rule 10b-5, regardless of public perception.

On June 13, 2011, the United States Supreme Court issued its decision in *Janus Capital Group, Inc., et al v. First Derivative Traders*, 2011 U.S. LEXIS 4380. (Exhibit A to Kelly Declaration). In *Janus* the Supreme Court held that the maker, and only the maker, of the allegedly fraudulent statements can be held liable under Rule 10b-5. In Janus, plaintiffs contended that both the mutual fund and the mutual fund's investment adviser should be liable for an alleged misstatement in the fund's prospectus. In rejecting plaintiffs' contention, the Supreme Court explained that Rule 10b-5 must be given "narrow dimensions." The Supreme Court stated that, "[f]or purposes of Rule 10b-5, the maker of a statement is the person or entity with ultimate authority over the statement,

[2] Plaintiffs filed their Fourth Amended Complaint on April 4, 2011. (D.E. 151). On April 14, 2011, a conference was held with the Court during which the Court discussed the merits of the Fourth Amended Complaint. The parties were directed to file a motion to dismiss. On May 6, 2011, defendants BDO McCabe, PKF Hong Kong, and PKF New York filed motions to dismiss (D.E. 152, 156). PKF New York joined BDO McCabe and PKF Hong Kong's motion to dismiss regarding lack of scienter. However, PKF New York filed its own separate motion and brief regarding the lack of statement by PKF New York.

including its content and whether and how to communicate it." The Supreme Court specifically rejected plaintiffs' suggestion that both defendants may be deemed to have made the allegedly offending statement "because [the advisor] was significantly involved in preparing the prospectus." The Supreme Court also rejected the argument that it was well understood by the investing public that a mutual fund advisor has a "well recognized and uniquely close relationship" with the fund. In doing so, the Supreme Court noted that the two entities are legally separate entities and that any reapportionment of liability in the securities fraud context should best be left to Congress.

On June 15, 2011, PKF New York submitted a letter to this court, notifying it of the *Janus* decision's dispositive impact on PKF New York's motion. (Exhibit B to Kelly Declaration). On June 17, 2011, the Court rejected the letter stating that "briefing is closed." (Exhibit C to Kelly Declaration). On July 19, 2011, prior to any opposition being filed or order issued by the Court, the motions to dismiss of all defendants were denied by the court. (D.E. 159, 160).

The holding in *Janus* is directly controlling on the current case and the facts in *Janus* are directly analogous to the present issue raised by PKF New York. Just as in *Janus*, here Plaintiffs are seeking to hold a defendant (PKF New York) liable for a statement made by a separate and distinct legal entity (PKF Hong Kong). Although like the defendants in the *Janus* case, the two separate PKF entities share the PKF element in their names, the relationship between PKF New York and PKF Hong Kong is far more attenuated than that of a financial advisor and fund as in *Janus*.

In *Janus*, the plaintiffs sought to hold Janus Capital Group, the creator of Janus Investment Fund, and its wholly owned subsidiary, Janus Capital Management LLC, which was hired to act as an investment adviser and fund administrator, liable for the

alleged misstatement in the Janus Investment Fund Prospectus. All of Janus Investment Fund's officers were also officers of Janus Capital Management LLC, however, the Court noted that the legal distinctions between the two companies were properly maintained and Janus Capital Management was not the "maker" of the alleged misstatement.

PKF New York and PKF Hong Kong share only the right to use the initials "PKF" in their names, and their membership in the PKF International global network of legally independent firms. Unlike in *Janus,* here there are no shared interests, responsibilities or management among the partners of either firm. Moreover, each accounting firm has separate clients, separate engagements and operates in separate jurisdictions. In *Janus*, the fund was entirely dependent on the other defendants for its existence and operation. Here, there is no such dependence. Yet in *Janus*, the Supreme Court found that only the actual maker in fact of the alleged misstatement may be liable. The distinction between the defendants in Janus was far less compelling than the distinction between PKF Hong Kong and PKF New York, but the holding is far more compelling.

Plaintiffs' previous justification for maintaining PKF New York as a defendant has been made clearly insufficient by the *Janus* decision. In spite of the possibility of public mis-attribution of PKF Hong Kong's statements to PKF New York, the fact remains that under *Janus*, the maker, and only the maker, of the allegedly fraudulent statements can be held liable under Rule 10b-5. It has been and continues to be abundantly clear that PKF New York did not have "ultimate authority over the statement, including its content and whether and how to communicate it," in this instance PKF Hong Kong's audit report. Mere attribution to PKF New York by the public is not enough

when the case law clearly draws a bright line of liability at the maker of the allegedly fraudulent statement.

POINT II

THIS COURT'S ORDER OF JULY 19, 2011, MUST BE CERTIFIED FOR INTERLOCUTORY APPEAL TO THE SECOND CIRCUIT COURT OF APPEALS IN LIGHT OF THE SUPREME COURT'S RULING IN *JANUS*

The Applicable Law

In order for a district court to certify one of its orders for interlocutory appeal, the party seeking certification must show that the order it seeks to appeal "(1) involves a controlling question of law (2) as to which there is substantial ground for difference of opinion and (3) that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). The overriding factor among these three requirements is the likelihood that immediate appellate review will materially advance the ultimate termination of the litigation. (*see Fisons Ltd. v. United States*, 458 F.2d 1241, 1248 (7th Cir.), *cert. denied*, 405 U.S. 1041 (1972)). Indeed, the Second Circuit has noted that "[t]he courts have tended to make the 'controlling question' requirement one with the requirement that its determination 'may materially advance the ultimate termination of the litigation' and that '[t]he critical requirement is that [an interlocutory appeal] have the potential for substantially accelerating the disposition of the litigation'" *In re Duplan Corp.*, 591 F.2d 139, 148 n. 11 (2d Cir. 1978) quoting 9 Moore, Federal Practice, ¶ 110.22[2] at 260 (1975).

The Instant Order Involves a Controlling Question of Law

A question of law is "controlling" if "reversal of the district court's order would terminate the action" *Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 25 (2d Cir.1990). For instance, questions of *in personam* and subject matter jurisdiction warrant

certification under section 1292(b) because their resolution may dispose of a case *Id.; see also Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326, 1330 (2d Cir. 1972). Appellate reversal of the Order denying PKF New York's motion for to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) would result in termination of the litigation against PKF New York. Specifically, should this case be certified for interlocutory appeal, the issue before the Second Circuit Court of Appeals will be whether defendant PKF New York should be liable for statements made by PKF Hong Kong, under the theory of public (mis)attribution. Because the Second Circuit's resolution of this issue could likely dispose of this case with respect to PKF New York, this case involves a controlling issue of law. Plaintiffs may argue that they should be granted leave to amend their pleading a sixth time, however, they continually have failed to allege with specificity any misstatement made by PKF New York, because, in truth, they cannot. That coupled with the fact that PKF Hong Kong acknowledges having sole control and being the maker of the statement renders reversal of the July 19, 2011 Order dispositive.

The Instant Order Also Concerns A Substantial Ground for Difference of Opinion

A "substantial ground for difference of opinion" exists when the party seeking certification can demonstrate that there exists substantial doubt about the law. *Shipping Corp.*, 752 F. Supp. 173, 175 (S.D.N.Y. 1990). In this instance, either the Court failed to consider *Janus* in its decision denying PKF New York's motion to dismiss or it has determined that *Janus* is inapplicable to the present situation. If the latter is the case, this issue is ripe for appeal to the Second Circuit Court of Appeals. The *Janus* opinion clearly states that, as respects Rule 10b-5 rule "the maker of a statement is the entity with authority over the content of the statement and whether and how to communicate it.

Without such authority, it is not "necessary or inevitable" that any falsehood will be contained in the statement." *Janus* at 16.

While "a substantial ground for difference of opinion" is not readily apparent, it would appear that the Second Circuit Court of Appeals may wish to reconsider its decisions in *Lattanzio* and *Wright* in light of the *Janus* decision. In *Lattanzio*, the Court held that, "to state a §10(b) claim against an issuer's accountant, a plaintiff must allege a misstatement that is attributed to the accountant "at the time of its dissemination," and cannot rely on the accountant's alleged assistance in the drafting or compilation of a filing" *Lattanzio v. Deloitte & Touche LLP*, 476 F.3d 147, 155 (2d Cir. 2007), citing *Wright v. Ernst & Young LLP*, 152 F.3d 169, 174 (2d Cir 1998). *Janus* abrogates the attribution requirement by limiting liability only the alleged maker of the statement, that is, the entity with authority over the content of the statement and whether and how to communicate it, rather than mere attribution. In this instance, it is not even attribution but mis-attribution to PKF New York that forms the alleged basis of liability.

Therefore, if this opinion is certified for appeal, the Second Circuit Court of Appeals will be faced with a single discreet question: whether *Janus* does away with the requirement that plaintiffs plead attribution of a misstatement to the accountant or whether plaintiffs must allege that the accountant was in fact the maker of the statement, as defined in *Janus*.

Resolution of This Issue by the Second Circuit Court of Appeals Would Materially Advance the Ultimate Termination of This Case

Finally, for certification to be appropriate, the district court must be of the opinion that immediate appeal of an order will literally accelerate the action as a whole. *People Who Care v. Rockford Bd. of Education Dist. No. 205*, 921 F.2d 132 (7th Cir. 1991)

(holding that resolution on appeal of ancillary issue of attorney's fees would not materially advance litigation). If the Second Circuit reverses this Court's July 19, 2011 decision, and finds that PKF New York is entitled to dismissal of the claims against it, plaintiffs' case will be terminated with respect to PKF New York.

In light of the potentially dispositive outcome of an appeal, allowing this case to move forward in discovery would improperly subject PKF New York to an immense amount of legal fees in having to participate in discovery and take depositions of witnesses located across the country, in Hong Kong and in the People's Republic of China. Indeed, litigation undoubtedly will be both expensive and extensive. Moreover, Plaintiffs have already received all of PKF New York's workpapers and electronic communications in discovery which took place prior to naming PKF New York in the instant lawsuit. (Kelly Declaration ¶4). Despite possessing PKF New York's documents, Plaintiffs have failed to identify or allege any instance where PKF New York authored or controlled any statement disseminated to the public or that Plaintiffs relied upon. Further, allowing Plaintiffs' fishing expedition at the expense of PKF New York, who clearly did not author or have authority over any statement made by PKF Hong Kong, is grossly unfair and an abuse of the legal system.

Based on the foregoing, it is clear that this decision presents just the type of circumstances which warrant immediate appellate review and as a result, it is respectfully requested that this matter be certified for interlocutory appeal pursuant to 28 USCA §1292(b).

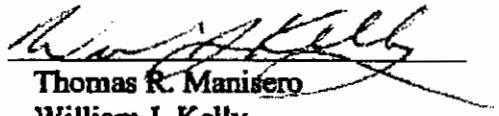
CONCLUSION

For all the foregoing reasons, defendant PKF New York respectfully requests the Court to grant PKF New York's motion for reconsideration or in the alternative certify the July 19, 2011 order for interlocutory appeal to the Second Circuit Court of Appeals.

Dated: White Plains, New York
August 1, 2011

Respectfully submitted,

Wilson, Elser, Moskowitz, Edelman & Dicker LLP

By: 

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